COMMUNITY COUNSEL

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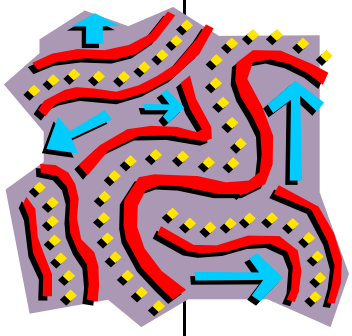
HB 1013 IS NOW THE LAW OF FLORIDA

Despite widespread pressure, including many newspaper editorials and statewide grassroots campaigns urging him to veto the measure, in late April, 2012, Florida Governor Rick Scott signed HB 1013 into law. It has an effective date of July 1, 2012.



The sole purpose of this law is to countermand the holding in the case of *Lakeview Reserve Homeowners Association v. Maradona Homes,* 48 So 3d 902 (Fla. App 5 Dist. 2010), discussed in the October, 2010 edition of our *Community Counsel.* In a signing statement released by the Governor to explain his rationale for signing the bill, he stated his desire to restore the law to what it had been for the preceding forty years. Unfortunately, that rationale makes sense only if one also assumes that the nature of Florida's residential real estate development has also remained static over the past forty years. Of course, that has not occurred and the past few decades have seen the rise of increasingly large residential communities with sophisticated infrastructure and complex mechanisms for self-governance, like community development districts and multi-layer community associations. In short, the Governor's fig leaf has no leaves.

So just what does this bill do? After July 1, 2012, no non-condominium or non-cooperative community (in other words, no HOA) will not be able to bring a claim against the developer of its infrastructure for breach of an implied warranty of fitness, habitability or merchantability. This applies to the streets, roads, driveways, sidewalks, drainage, utilities, and any other improvement or structures, including clubhouses. The narrow bases remaining for suit will be (1) the existence of building code violations, or (2) breach of the terms of a specific written contract, or damage to persons or property other than to the infrastructure itself. However, if the roads start to sink and the value of homes in the community diminish, or if the clubhouse becomes infested with termites and suffers from poor construction that results in wood rot and water intrusion, all bets are off and the developer will walk free and clear, as the statute prohibits claims by both the owners and their HOA.

There is simply no public policy that can justify this result. Residential developers and builders are not designing cutting edge products that promise to so substantially improve the human condition as to warrant a grant of near immunity from liability for the consequences of their commercial activities. Instead, they are just heavy political donors and this bill is payback. And it is payback at the expense of Florida's consumers. It robs them of protection for amenities that are specifically designed and offered by developers for the purpose of influencing their decision about where to live, and which are easy pickings because they are not directly owned by the consumers, even though it will be these consumers who will have to pay to correct large-scale developer errors.

If the Trayvon Martin tragedy has taught Florida anything, it is to pay attention to the laws passed by our state government. "Stand and defend" ticked like a time bomb until it took a young man's life. How long will HB 1013 tick before it explodes and robs our neighbors of their savings and incomes when their dream communities turn to mud and rubble and they are forced to pay to make them right again? If we do not pay attention to our government it will not pay attention to us and then we will get the government we deserve.

RECENT CASES

- RV PARK GUILTY OF EXTREME OVERREACHING IN TRYING TO FORCE OWNERS TO JOIN ITS RENTAL PROGRAM.
- OWNER'S OVER EAGER DEFENSE OF COLLECTION ACTION RESULTS IN REVERSAL SO ASSOCIATION CAN HAVE A CHANCE TO PROVE ITS FORECLOSURE CLAIM OR ELECT TO PURSUE MONEY JUDGMENT, WHICH DOES NOT REQUIRE SAME PROOF.

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RECENT CASE SUMMARIES

In **Clark vs. Bluewater Key RV Ownership Park**, 37 Fla. L. Weekly D836a (Fla. 3rd DCA, April 11, 2012), Owner owned a lot in Association, a luxury RV park. The park contained common areas that include a pool, clubhouse, park, and other areas that are available for lot owners' use. Association also operated a rental program that provided cleaning and greeting services to tenants at a fifteen percent commission on the rental rates. Owner rented his lot without using Association's rental program. To regulate owners' rental of their lots, Association's board of directors enacted three resolutions. In addition to imposing requirements for owners to meet before renting their lots, such as identification requirements and ensuring available liability insurance, one resolution imposed a daily fee of $11.00 upon owners who allowed use of their lots by non-owners. The fee for lot owners who rented through Association's rental program would be paid through the rental commission charged. For lot owners that did not use Association's rental program, the fee was charged monthly to the lot owner. A final resolution established a penalty for non-payment of the fee, as a special assessment against the rented lots. All of the resolutions were adopted by the board of directors, not by vote of the lot owners. Owner rented his lot but did not pay the fee. As a result, a lien was placed against Owner's lot. Owner challenged the user fee and the rental program. Owner claimed Association exceeded the powers of its governing documents. The trial court ruled in favor of Association and Owner appealed to the Third District Court of Appeal. To resolve the dispute, the appellate court reviewed the governing documents' provisions regarding each power Association invoked. Owner contended that Association imposed restrictions that could only arise through a vote of the membership. Under the declaration, an owner's right to lease his lot in the park was subject to "the reasonable rules, regulations and procedures promulgated by the Association." There was no provision in the governing documents authorizing fees for leasing. Association's bylaws provided that the board of directors may adopt, amend, modify, or rescind rules and regulations for operation and use of Association's property. Under the declaration, Association's property included the common areas, but not the lots. There were no provisions in the bylaws regarding fees for use of the common areas. The governing documents also permitted Association to levy assessments against the lots. However, the fee for rentals was not within Association's power to regulate leasing or impose assessments. The fee was not an "assessment" nor "special assessment" as defined by the declaration. Association contended that the lease fee was a user fee "special assessment" charged to those who choose to rent their lots. However, the declaration required assessments to be assessed equally, and this assessment was assessed against specific lots, those lots that are leased without using Association's rental program. Consequently, the appellate court reversed the trial court's determination regarding the validity of the fee requirement and resulting assessments.

In **Moors Master Maintenance Association, Inc. vs. Gain**, FLW SUPP 1906 Moor (11th Judicial Circuit (Appellate), February 14, 2012) Association appealed an adverse judgment dismissing its complaint to collect unpaid assessments. Association filed a two count complaint, the first count was to foreclose a claim of lien for unpaid assessments, and a second count for a money judgment. Owner filed a motion to dismiss the complaint and alleged a failure to satisfy a condition precedent, and a failure to state a cause of action. Specifically, Owner argued that Section 720.3085, Fla. Stat., sets forth the pre-suit procedures which a homeowners' association must follow to foreclose on a claim of lien, including sending a demand letter, recording a claim of lien, and sending the recorded claim of lien and a notice of intent to foreclose, to the property owner prior to initiating an action to foreclose on the lien. On appeal, the appellate court noted that the provisions of the statute are in fact conditions precedent. However, the court found that a failure of a condition precedent is an affirmative defense, which was not appropriate for a motion to dismiss unless the allegations themselves demonstrate the existence of an affirmative defense. In addition to the claim of failure to satisfy conditions precedent, Owner claimed that Association's complaint failed to state a cause of action because the pre-suit letters, attached to the complaint as exhibits, conflicted with Association's allegations that it satisfied the statutory prerequisites because the postal receipt attached to the pre-suit demand letter was blank. The appellate court noted that this may be an issue for discovery and a motion for summary judgment, but not a motion to dismiss. Finally, the appellate court found that the trial court's dismissal with prejudice of the complaint effectively denied the Association the ability to sue for money damages under count two of the complaint. The conditions precedent of the statute apply only to an action to foreclose a claim of lien, and do not apply to actions to recover money damages.

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